IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH P. MCCARRON,	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	
	:	NO. 00-CV-6123
BRITISH TELECOM d/b/a/	:	
YELLOWBOOK USA,	:	
YELLOWBOOK USA a/k/a	:	
BRITISH TELECOM,	:	
SCOTT RUBEL,	:	
JIM MCCUSKER,	:	
VICTORIA SCHARRARR,	:	
JOSEPH A. WALSH,	:	
ANN SNYDER-REBSTOCK, and	:	
LINDA FLYNN,	:	
Defendants.	:	

MEMORANDUM

GREEN, S.J. **August _____, 2002**

Presently before the Court are the following: (1) Defendants' Motion for Summary Judgment, Plaintiff's Response, Defendants' Reply, Plaintiff's Supplemental Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment and Defendants' Reply thereto; and (2) Plaintiff's Motion for Partial Summary Judgment and Defendants' Response. For the following reasons, Defendants' motion will be granted and Plaintiff's motion will be denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

The following facts underlying the instant action are stated in the light most favorable to Plaintiff Joseph P. McCarron ("Plaintiff") and, as stated, are not in dispute. On June 24, 1996, Plaintiff was hired as an Account Executive by Yellow Book USA, Inc. ("Yellow Book"), one of

the nation's largest publishers of telephone directories.[1] As an Account Executive, Plaintiff was responsible for developing and maintaining advertising accounts for the Yellow Book directories. Initially, Yellow Book hired Plaintiff to work in its New Jersey office, but in February 1998, transferred Plaintiff to its office in Horsham, Pennsylvania.

In April 1998, Plaintiff was granted a medical leave under the Family Medical Leave Act and was subsequently hospitalized. During his hospitalization, Plaintiff's father, who had requested leave on Plaintiff's behalf, maintained regular contact with Anne Snyder-Rebstock ("Defendant Snyder-Rebstock"), a Human Resources Manager, and provided the requested documentation for such leave. Although Plaintiff had been hospitalized for a bipolar "episode," upon his return to work in June 1998, Plaintiff informed Daniel Staub, his supervisor, that he had been hospitalized because of a reaction between his diet pills and his "maintenance medication."

Beginning in late 1998 and through mid-1999, Plaintiff, who at the time of his hiring weighed approximately 255 pounds, claims that he endured comments regarding his weight. Specifically, Plaintiff claims that he was told by Scott Rubel ("Defendant Rubel"), a District Sales Manager, that he had a "fat face" and that he should "lose twenty pounds," and that he was referred to by Jim McCusker ("Defendant McCusker"), the Assistant Vice-President of Sales for

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[1]The claims presented by Plaintiff in the Complaint require a brief description of the corporate structure of Yellow Book. On August 31, 1999, Tadworth Corporation, a Delaware corporation, acquired a partnership interest in, and purchased the tangible assets of, Yellow Book Mid-Atlantic, a limited partnership which employed Plaintiff. Following the sale, Tadworth Corporation owned 100% of the general partnership, Yellow Book GP, LLC and all of the limited partnership interests. In October 1999, Tadworth Corporation changed its name to Yellow Book USA, Inc. However, British Telecommunications, PLC ("Defendant British Telecom"), a British corporation operating principally in London, England, at one point in time owned 100% of the outstanding shares of Tadworth Corporation and hence, indirectly owned 100% of the outstanding shares of Yellow Book. Defendant British Telecom sold all of its interest in Yellow Book on June 22, 2001.

the Mid-Atlantic Region, as the "Nutty Professor." Plaintiff also claims that Daniel Staub disclosed in a room full of Plaintiff's co-workers that Plaintiff had "overcome a sickness." As a result of these comments, Plaintiff sent a seven-page memorandum detailing his problems at work to Defendant Rubel, Defendant McCusker and Joseph A. Walsh ("Defendant Walsh"), President and Chief Executive Officer of Yellow Book.

Thereafter, on or around July 14, 1999, Plaintiff left a voice mail message for Defendant Snyder-Rebstock requesting "Family Leave" to deal with a "family situation." Defendant Snyder-Rebstock returned Plaintiff's call and left a message informing him that she had sent him the necessary paperwork and reminding him that Yellow Book required documentation to support the leave request. The following day, Plaintiff left a message for Defendant Snyder-Rebstock telling her that he would not provide any additional information regarding his leave request and told her to "leave him alone" until he took care of his "family situation." Defendant Snyder-Rebstock again called Plaintiff and left another message stating that she needed to discuss his "family problem" to determine whether it qualified for leave. She also stated that Plaintiff would have to speak with a manager or his absence would be unauthorized and that three consecutive days of unauthorized absence would be considered a resignation. Plaintiff did not respond to Defendant Snyder-Rebstock's message.

By July 19, 1999, Plaintiff had accumulated three days of unauthorized absence. On that same day, Plaintiff was hospitalized for treatment of a bipolar episode. In accordance with the company's policy on unauthorized absences, Yellow Book terminated Plaintiff's employment on July 26, 1999. Victoria Scharrarr ("Defendant Scharrarr"), Senior Vice-President of Sales for the Mid-Atlantic region, Linda Flynn ("Defendant Flynn"), a Human Resources Director, and

Defendant McCusker all reviewed and approved Plaintiff's discharge.

Following his release from the hospital on August 2, 1999, Plaintiff initiated several contacts with certain of the individual Defendants as well as John Bruggerman, his former manager in Yellow Book's New Jersey office. Plaintiff also attempted to submit the required FMLA forms. On September 23, 1999, Defendant Flynn, via letter, instructed Plaintiff to cease all correspondence with Yellow Book employees because he was no longer employed by Yellow Book.

On or about December 4, 2000, Plaintiff filed a five (5) count Complaint, alleging: (1) that Defendants discriminated against him because of his alleged disabilities, morbid obesity and bipolar disorder, in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* ("ADA") (Counts I and II) and in violation of the Pennsylvania Human Relations Act, 43 Pa. Cons. Stat § 951, *et seq.* ("PHRA") (Counts IV and V); and (2) that he was denied a qualified leave and discharged in violation of the Family Medical Leave Act, 29 U.S.C. § 2601, *et seq.* ("FMLA" or "Act") (Count III). Defendant British Telecom and Defendant Walsh filed a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(5) and 12(b)(6), or in the alternative, a motion for summary judgment pursuant to Fed.R.Civ.P. 56(c), although Defendant Walsh later withdrew his 12(b)(5) motion.[2] By Memorandum Opinion dated June 8, 2001, the Court denied Defendants' motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(5) and 12(b)(6).

Defendants now move for summary judgment as to all counts of Plaintiff's Complaint.

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[2]Defendants requested that the Court treat their 12(b)(6) motion as one for summary judgment under Fed.R.Civ.P. 56 because their motion was supported by Defendant Walsh's declaration. However, because Plaintiff did not have the opportunity to conduct discovery regarding the allegations made by Defendant Walsh, the Court did not consider materials outside of the pleadings and evaluated Defendants' motion pursuant to Fed.R.Civ.P. 12(b)(6).

Plaintiff filed a Response, Defendants filed a Reply and Plaintiff filed a Supplemental Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment to which Defendants responded. Plaintiff also filed a Motion for Partial Summary Judgment to which Defendants responded. Oral argument has been heard on all of said motions and was considered in deciding the motions. Furthermore, the Court granted Plaintiff's counsel leave to file a supplemental brief in opposition to Defendants' motion for summary judgment, which has been filed and considered.

II. LEGAL STANDARD

Summary judgment shall be awarded "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A fact is material if it might affect the outcome of the suit under relevant substantive law. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute regarding a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id.

A party seeking summary judgment bears the initial responsibility of identifying the basis for its motion, along with evidence clearly demonstrating the absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has carried the initial burden of showing that no genuine issue of material fact exists, the nonmoving party cannot rely on conclusory allegations in its pleadings, memoranda or briefs to establish a genuine issue of material fact. See Pastore v. Bell Tel. Co. of Pa., 24 F.3d 508, 511 (3d Cir. 1994). Rather, the nonmoving party must establish the existence of every element

essential to its case, based on the affidavits or by the depositions and admissions on file. See id. (citing Harter v. GAF Corp., 967 F.2d 846, 852 (3d Cir. 1992)); see also Fed.R.Civ.P. 56(e). The evidence presented must be viewed in the light most favorable to the nonmoving party. See Lang v. New York Life Ins. Co., 721 F.2d 118, 119 (3d Cir. 1983).

III. DISCUSSION

A. British Telecom

The ADA, PHRA and FMLA all prohibit employers from discriminating against covered employees. Defendants argue that Defendant British Telecom, as the parent of Yellow Book, cannot be held liable under the ADA, PHRA or FMLA because it was not Plaintiff's employer as defined under the ADA, PHRA, or FMLA.[3] In general, a parent corporation is not liable for its subsidiary's alleged employment discrimination. See Marzano v. Computer Science Corp., Inc., 91 F.3d 497, 513-14 (3d Cir. 1996). However, a parent may be considered the employer of its subsidiary's employees if the two corporations share (1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control. See Radio & Television Broad. Technicians Local Union 1264 v. Broadcast Serv. of Mobile, Inc., 380 U.S. 255, 256 (1965); see also Johnson v. Flowers Indus., Inc., 814 F.2d 978, 981 n.1 (4th Cir. 1987)). Nevertheless, there is a "strong presumption" that a parent is not the employer of its subsidiary's employees and that such a relationship exists only in "extraordinary circumstances." Marzano, 91 F.3d at 513 (citing Flowers Indus., Inc., 814 F.2d at

[3]The ADA prohibits discrimination in employment by a "covered entity" or employer. See 42 U.S.C. § 12112(a). Similarly, the PHRA prohibits "employers" from discriminating against individuals with a non-job related disability. See 43 Pa. Cons. Stat. § 955. Finally, the FMLA requires "employers" of eligible employees to comply with the leave requirements of the Act. See 29 U.S.C. §§ 2611(4), 2612.

980-81).

In support of their assertion that Defendant British Telecom was not Plaintiff's employer, Defendants note that: (1) Defendant British Telecom acquired an ownership interest in Yellow Book on August 31, 1999, after Plaintiff was discharged; and (2) Defendant British Telecom and Yellow Book operated independently of each other in all respects. (See Walsh Aff. ¶¶ 10-13, 15.) Plaintiff does not dispute the proffered evidence. Rather, Plaintiff moves for a continuance of this issue, claiming that he cannot respond to Defendants' arguments because Defendants have not adequately responded to his requests for information on the relationship between the two entities. (See Pl.'s Resp. at 6.)

Upon review, the evidence before me supports Defendants' contention that Defendant British Telecom was not Plaintiff's employer. Furthermore, I will not grant Plaintiff additional time to respond to Defendants' motion. Defendants provided answers to Plaintiff's Requests for Admissions; it is Plaintiff's responsibility to determine, through additional discovery, if they are sufficient and Plaintiff merely suggesting that those responses are insufficient, as a reason for granting additional discovery, is unpersuasive. In addition, by Order dated January 18, 2002, I granted Plaintiff's Motion to Compel the Designation of a Rule 30(b)(6) Deponent on Behalf of Corporate Defendants British Telecom and Yellow Book USA. Pursuant to that Order, Plaintiff was granted leave to depose the designated representatives of those two corporate entities in order to determine the relationship between them and was permitted to supplement any pending motions or responses with information gained from those depositions. Yet, Plaintiff has presented no additional information to the Court. Therefore, because I have provided Plaintiff ample opportunity to conduct discovery on this matter, Plaintiff may not now plead that he has

insufficient knowledge to respond to Defendants' assertion that Defendant British Telecom, as the parent of Yellow Book, was not Plaintiff's employer, and therefore, cannot be held liable for the alleged discriminatory acts of Yellow Book. Accordingly, I will grant summary judgment in favor of Defendant British Telecom.

B. Family Medical Leave Act

Under the FMLA, eligible employees are entitled to twelve weeks unpaid leave during "any 12-month period" for certain family reasons and any "serious health condition" that "makes the employee unable to perform . . . ." 29 U.S.C. § 2612(a)(1).[4] The FMLA also entitles employees to reinstatement to their former position or an equivalent one with the same benefits, pay, and other terms upon the completion of the leave. See 29 U.S.C. § 2614(a). Employers may not deny or interfere with an employee's rights guaranteed by the FMLA and are prohibited from discharging or discriminating against any eligible employee who exercises those rights. See 29 U.S.C. § 2615(a)(1) and (a)(2).

In Count III of the Complaint, Plaintiff alleges that Defendants wrongfully terminated and failed to reinstate him in violation of the FMLA. Defendants assert that they are entitled to summary judgment as to Plaintiff's claims under the FMLA because Plaintiff failed to provide Yellow Book with enough information to put it on notice that Plaintiff was entitled to FMLA leave.

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[4]A "serious health condition" is defined as an "illness, injury, impairment, or physical or mental condition" that involves: either (1) inpatient care; or (2) continuing treatment by a healthcare provider. 29 C.F.R. § 825.114(a). The FMLA defines eligible employees as those who have been employed for at least 12 months by the employer and for at least 1,250 hours during the previous 12-month period. See 29 U.S.C. § 2611(2)(A). Defendants do not contest that Plaintiff is an eligible employee as defined by the FMLA.

1. Notice

The FMLA and its regulations impose certain notice requirements to be granted leave. See 29 C.F.R. §§ 825.302 and 825.303. If leave is foreseeable, an employee must provide at least 30 days advance notice to the employer, or if 30 days notice is impossible under the circumstances, then notice is required "as soon as practicable." See 29 C.F.R. § 825.302(a). If leave is unforeseeable, as it was here, the employee is to give notice "as soon as practicable under the facts and circumstances of the particular case." 29 C.F.R. § 825.303(a). Generally, "as soon as practicable" means no more than two days after learning of the need for the leave, although an exception is made where extraordinary circumstances prevent such notice. See 29 C.F.R. § 825.302(b). Notice may be provided by the employee or by a "spokesperson" if the employee is not able to do so, either in person "or by telephone, telegraph, [fax] or other electronic means." 29 C.F.R. § 825.303(b).

An employee giving notice of the need for unpaid FMLA leave "need not expressly assert rights under the FMLA or even mention the FMLA," but, at a minimum, must provide sufficient information to notify the employer that he needs FMLA leave. 29 C.F.R. § 825.302(c). Although there is no precise definition as to what constitutes "sufficient notice," an employee is required to provide his employer with enough information for the employer to determine that the leave qualifies under the Act. See Price v. City of Fort Wayne, 117 F.3d 1022, 1026 (7th Cir. 1997) (holding that sufficient notice "is given when the employee requests leave for a covered reason"); Manuel v. Westlake Polymers, Corp., 66 F.3d 758, 764 (5th Cir. 1995) (stating that sufficient notice is given when the information provided can reasonably apprise the employer of the employee's request to take time off for a serious health condition).

However, the regulations emphasize that it is the employer's responsibility to determine the applicability of the FMLA and to consider requested leave as FMLA leave. As such, the regulations provide that if an employee has not provided enough information to put the employer on notice that FMLA-qualified leave is needed, the employer is expected to obtain "any additional required information through informal means." 29 C.F.R. § 825.303(b). "In all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee." 29 C.F.R. § 825.208(a).

In this case, Plaintiff left a voicemail message for Defendant Snyder-Rebstock on July 14, 1999, stating that he was requesting "Family Leave." (Snyder-Rebstock Aff. ¶ 12; McCarron Dep. at 50-52.) It is undisputed that Plaintiff did not state the real reason for requesting Family Leave; instead, Plaintiff told Defendant Snyder-Rebstock that he required leave to remedy a "family situation." (Pl.'s Ex. G; Pl.'s Mot. at 6; Pl.'s Resp. at 8.) It is also undisputed that Defendant Snyder-Rebstock, as required under the regulations, attempted to contact Plaintiff through "informal means" to ascertain the underlying reason for the leave and to designate Plaintiff's leave as FMLA-qualifying. She left two voice mail messages for Plaintiff, offering to assist him in processing the necessary forms, requesting that he call her, and warning him of the consequences of not providing a reason for leave. (See Snyder-Rebstock Aff. ¶¶ 13, 15.) Plaintiff responded by refusing to provide any "details" and telling her to "leave [him] alone" until he took care of his "family problem;" he did not respond to the second message at all. (McCarron Dep. at 58-60.) Moreover, Plaintiff did not contact Defendant Snyder-Rebstock following his receipt of the July 26, 1999 discharge letter nor following his discharge from the hospital in August 1999. (See McCarron Dep. at 83-85.)

Considering all of the facts and circumstances presented, no rational trier of fact could conclude that the information Plaintiff provided to Yellow Book on July 14 was enough for Yellow Book to determine that the requested leave qualified under the FMLA. Furthermore, Defendant Snyder-Rebstock, as required under the regulations, contacted Plaintiff through "informal means" to ascertain the underlying reason for the leave and to designate Plaintiff's leave as FMLA-qualifying. Yet, every attempt to ascertain the required information was met by Plaintiff's refusals to provide any such information. Moreover, the information Plaintiff imparted to Defendant Snyder-Rebstock was not correct.

Plaintiff argues, however, that he "remedied" his insufficient notice. FMLA regulations provide that "[t]he employee or spokesperson will be expected to provide more information when it can readily be accomplished as a practical matter, taking into consideration the exigencies of the situation." 29 C.F.R. § 825.303(b). As such, Plaintiff contends that following his discharge from the hospital, he fulfilled his obligations under the FMLA by contacting several individuals at Yellow Book and providing a qualifying reason for his leave. (See Pl.'s Resp. at 15-16.) However, even viewing the evidence in the light most favorable to Plaintiff, I cannot conclude that a rational trier of fact would find that the contacts initiated by Plaintiff following his release from the hospital provided any more of an explanation of the reason for his requested leave in July than the previous reasons provided. Again, Plaintiff did not represent the real reason for his request for leave; rather, he represented that he was suffering from "memory problems" and described his request for leave as "personal" and to care for a "parent."

Although Plaintiff attributes the dearth of information he provided in these contacts with Yellow Book employees to the fact that he did not feel completely back to normal until at least

October of 1999 (see Pl.'s Resp. at 15; Pl.'s Ex. B at 79), there is no medical evidence indicating that he could not have communicated the reason for his leave. Moreover, the hospital discharge summary described Plaintiff as "[s]table, nonpsychotic, cooperative." (Defs.' Attach. G.) Thus, under these facts and circumstances, I cannot find that a reasonable jury could conclude that the information Plaintiff provided to Yellow Book was sufficient notice to make Yellow Book aware that his absence was due to a FMLA-qualifying reason.

Plaintiff raises the ancillary argument that even assuming arguendo that his notice was insufficient, his "erratic, irrational" behavior prior to both leaves imputes knowledge to Defendants that Plaintiff "was suffering from some sort of medical and/or physical condition(s) that were serious enough to warrant hospitalization," such that no genuine issue of material fact exists as to Defendants' knowledge of Plaintiff's reason for requesting leave. (Pl.'s Mot. at 8.) Plaintiff points to Defendant Rubel's observations of his behavior only days before his request for FMLA leave as well as Daniel Staub's statement following Plaintiff's 1998 leave, that he thought Plaintiff had overcome a "sickness." (Pl.'s Ex. F; Pl.'s Ex. D at 21; Pl.'s Ex. B at 217.) Plaintiff also argues that the circumstances surrounding his leave in 1999 were similar to those in 1998 such that Defendant Snyder-Rebstock should have known that his leave was FMLA-qualifying. (See Pl.'s Mot. at 11.)

Defendants counter by arguing that the evidence presented by Plaintiff fails to impute knowledge to Defendants. Defendants argue that at most, Defendant Rubel's memo describes an employee acting "petulantly" and that Plaintiff's reason for requesting leave in 1998 was due to "memory problems" (Snyder-Rebstock Dep. at 22-23, 67-68, 78) and a reaction to diet drugs (see Staub Dep. at 9, 21-25), a description which, at best, describes a temporary condition from which

Plaintiff recovered and which is dissimilar from Plaintiff's 1999 request for "Family Leave" due to a "family problem."

Upon review, Plaintiff has not pointed to any evidence that would lead a reasonable jury to conclude that knowledge of Plaintiff's bipolar condition could have been imputed to Defendants due to Plaintiff's behavior, comments made by employees at Yellow Book or Plaintiff previously requesting and being granted FMLA leave. There was no reason for Defendants to believe anything else concerning Plaintiff's request for leave except what Plaintiff told them and there is no evidence that Defendants found out otherwise.

Accordingly, because the undisputed record evidence establishes that Plaintiff provided insufficient notice, did not respond to requests for a more particularized reason underlying his request for leave, and failed to cure such deficiencies when he was able, Defendants did not violate the FMLA by refusing to grant Plaintiff leave, discharging him, and refusing to reinstate him. There is no evidence that Defendants knew the real reason for Plaintiff's request for leave. Rather, Plaintiff was absent, without authorization, for three days, and according to company policy, such absences warranted discharge. Therefore, Defendants' reason for terminating Plaintiff cannot be found to be pretextual, and as such, there was no actionable adverse personnel action taken against Plaintiff.

2. Plaintiff's Retaliation and Medical Certification Claims

Plaintiff makes two additional arguments in support of his motion for partial summary judgment. First, Plaintiff asserts a claim for retaliation. As stated previously, the FMLA prohibits employers from discharging or in any other manner discriminating against an employee who exercises his rights under the FMLA. See 29 U.S.C. § 2615(a)(2). To establish a prima

facie case for discrimination or retaliation under the FMLA, a plaintiff must demonstrate that: (1) the employee was protected under the FMLA; (2) the employee suffered an adverse employment action; and (3) a causal connection existed between the adverse decision and the plaintiff's exercise of his FMLA rights. See Oswalt v. Sara Lee, 889 F. Supp. 253, 258-59 (N.D. Miss. 1995), *aff'd*, 74 F.3d 91 (5th Cir.1996).

In his pleadings and written submissions, Plaintiff argues that he was terminated because he exercised his right to take FMLA leave. (Pl.'s Mot. at 8-13; Pl.'s Resp. at 10-15.) However, it is undisputed that Yellow Book's company policy was to discharge employees for three days of unauthorized absence. While Plaintiff argues that the advancement of that policy in terminating him was pretextual, he can point to no evidence in the record which would permit a reasonable jury to conclude that Plaintiff was terminated for exercising his rights under the FMLA; rather, the evidence supports the conclusion that Plaintiff was terminated for being absent from work for three days without authorization.

At oral argument, Plaintiff advanced an entirely new argument, that he was terminated because he exercised his right to take FMLA leave in 1998. Again, however, Plaintiff can point to no evidence which would permit a reasonable jury to conclude that he was terminated in 1999 for exercising his rights under the FMLA in 1998. Therefore, Plaintiff's claims for retaliation must fail.

Plaintiff's second argument in support of partial summary judgment is that Yellow Book violated the FMLA by terminating him without notifying him of the need for medical certification and for giving him less than 15 days from the date Defendant Snyder-Rebstock sent Plaintiff leave forms to document his leave request. (See Pl.'s Mot. at 13.) FMLA regulations

provide that following an employee providing sufficient notice, an employer may, if it doubts the seriousness or veracity of an employee's condition, request that the employee provide certification issued by a health care provider. See 29 C.F.R. § 825.305(a).

Here, it is undisputed that Plaintiff did not state the real reason underlying his request for leave and that Defendant Snyder-Rebstock initiated several contacts to determine the underlying reason. However, there is no evidence that Defendant Snyder-Rebstock disbelieved Plaintiff's proffered reason and requested medical certification; rather, the only evidence is that she attempted, "through informal means," to designate Plaintiff's leave as FMLA-qualifying. Upon Plaintiff's failure and refusal to provide sufficient notice, Yellow Book was not obligated to request medical certification and was not in violation of the FMLA when it treated Plaintiff's absences as unauthorized and discharged him in accordance with company policy. Therefore, Plaintiff's second argument must also fail. Accordingly, Plaintiff's motion for partial summary judgment will be denied and Defendants' motion for summary judgment as to Plaintiff's FMLA claim will be granted.

C. Americans with Disabilities Act

The ADA provides that no covered employer "shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, . . . and other terms, conditions and privileges of employment." 42 U.S.C. § 12112(a).[5] In Counts I, II, IV and V of the Complaint, Plaintiff alleges that Defendants violated the ADA and PHRA for a host of

[5]A "qualified individual with a disability" is an "individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8).

reasons, including unlawful termination, unlawful discrimination, denying reasonable accommodation, and harassing Plaintiff on the basis of his disabilities. Defendants move for summary judgment, arguing that Plaintiff has failed to make out a prima facie case for disability discrimination because Plaintiff has failed to demonstrate that: (1) he was disabled within the meaning of the ADA and PHRA; and (2) he was discriminated against or harassed because of his alleged disabilities.[6]

1. Disability under the ADA and PHRA

A plaintiff establishes that he is a member of a protected class of disabled persons by showing that he has a disability. Under the ADA's definition of disability, a plaintiff must show that he has: (1) a physical or mental impairment that substantially limits one or more major life activities; (2) a record of such an impairment; or (3) [is] regarded as having such an impairment. See 42 U.S.C. § 12102(2).

Generally, when determining whether a plaintiff asserting claims under the ADA is affected by a disability that substantially limits a major life activity, a court should consider: "(i) [t]he nature and severity of the impairment; (ii) [t]he duration or expected duration of the impairment; and (iii) [t]he permanent or long term impact resulting from the impairment." 29 C.F.R. § 1630.2(j)(2). Although the ADA does not define "major life activities," an individual is substantially limited in a major life activity when he is "[u]nable to perform a major life activity that the average person in the general population can perform," or is "[s]ignificantly restricted as to the condition, manner or duration under which [he] can perform a particular major

[6]Disability claims under the PHRA are considered under the same analysis as cases under the ADA. See Kelly v. Drexel Univ., 94 F.3d 102, 105 (3d Cir. 1996).

life activity" compared to the "average person in the general population." 29 C.F.R. § 1630.2(j).

However, in Sutton v. United Airlines, Inc., 527 U.S. 471 (1999), the Supreme Court made clear that any determination as to whether an individual is disabled should be made in reference to any measures that mitigate the individual's impairment. Id. at 482-83. As such, a person whose physical or mental impairment is corrected by medication or other mitigating measures cannot be considered to have an impairment that substantially limits a major life activity. See id.

Plaintiff claims that he suffers from two (2) disabilities, morbid obesity and bipolar disorder. As to Plaintiff's claim that he is disabled because of his weight, the Court notes the Third Circuit's decision in Walton v. Mental Health Ass'n of Southeastern Pa., 168 F.3d 661 (3d Cir. 1999). In that decision, the Third Circuit declined to determine whether a cause of action under the ADA existed due to morbid obesity because the plaintiff had not adequately pled her claim. See id. at 665. Therefore, the issue of whether such a cause of action exists remains open.

As to Plaintiff's asserted bipolar disorder, Defendants argue that Plaintiff cannot make out the claim that his bipolar disorder was a disability. Specifically, Defendants argue that the disorder only interfered with such activities during an "episode," when Plaintiff was not on prescribed medication. (See Def.'s Mot. at 22.) To rebut Defendants' claim, Plaintiff proffers the report of Marvin Kanefield, D.O., who opines that Plaintiff is substantially limited in performing the major life activities of caring for himself and "interacting with and relating to others."[7] (Pl.s' Supplemental Mem. of Law in Opp'n to Defs.' Mot. for Summ. J., Ex. A.)

[7]These major life activities are in addition to the fact that Plaintiff alleges that his "[b]ipolar episodes completely prevent [him] from sleeping and thinking/concentrating." (Pl.'s Resp. at 25.)

Defendants challenge Plaintiff's proffered report, arguing that the report does not support a finding that Plaintiff is disabled. Defendants claim that Dr. Kanefield's report fails to identify how Plaintiff is substantially limited in caring for himself or interacting with others outside of a manic episode, does not exclude the use of diet pills, which could be eliminated, as the cause of Plaintiff's episodes, nor establishes that Plaintiff's condition is not controllable by medication. (Defs.' Resp. to Pl.'s Supplemental Mem. of Law in Opp'n to Defs.' Mot. for Summ. at 2-4.)

However, because significant questions remain as to whether morbid obesity can constitute a disability and because Dr. Kanefield's report raises a genuine issue of material fact as to whether Plaintiff is disabled under the ADA, Defendants' arguments are unavailing. Accordingly, Defendant is not entitled to summary judgment as a matter of law on the issue concerning the question of disability.

2. Adverse Employment Action

Nevertheless, finding a genuine issue of material fact as to whether Plaintiff is disabled under the ADA does not preclude granting summary judgment in Defendants' favor as to Plaintiff's claim for discrimination under the ADA. To prevail on a discrimination claim based upon a violation of the ADA, a plaintiff must establish a prima facie case of unlawful discrimination. To meet this burden, a plaintiff must establish that: (1) he has a disability within the meaning of the ADA; (2) he is "otherwise qualified" to perform the essential functions of the job, with or without reasonable accommodation; and (3) he has suffered an otherwise adverse employment action as a result of his disability. See Shiring v. Runyon, 90 F.3d 827, 831 (3d Cir. 1996).

If the plaintiff succeeds, the burden of production shifts to the defendant to articulate

some legitimate, nondiscriminatory reason for the adverse employment action, which in this case, was Plaintiff's termination. See Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994). If the defendant meets this burden, the burden of production again falls on the plaintiff to show by a preponderance of the evidence that the employer's explanation is pretextual and that discrimination was the real reason for the plaintiff's termination. See id.

Assuming arguendo that Plaintiff was at all relevant times, disabled, summary judgment must be granted to Defendants because Plaintiff cannot make out the elements of an adverse employment action. At oral argument, Plaintiff's counsel was asked to specifically state the adverse personnel action taken against Plaintiff; counsel responded by stating that it was Defendants' failure to grant Plaintiff leave under the FMLA and their terminating him for taking that leave. However, for the same reasons Plaintiff could not make out a claim under the FMLA, see *supra*, Part III.B.1., Plaintiff cannot make out a claim of an adverse employment action as a result of unlawful disability discrimination. The legitimate, nondiscriminatory reason for terminating Plaintiff was Plaintiff's three-day unauthorized absence in July 1999 in violation of company policy. Plaintiff has not met his burden of pointing to some evidence from which a reasonable jury could either disbelieve Defendants' articulated nondiscriminatory reason or believe that an invidious discriminatory reason was more likely than not a motivating factor in Defendants' decision to terminate him. See Fuentes, 32 F.3d at 764.

Besides alleging that he was discriminated against on the basis of his asserted disabilities, Plaintiff also alleges discrimination in the terms and conditions of his employment. Specifically, Plaintiff alleges that following his transfer in February 1998, Defendant Scharrarr placed him in lower level positions that prevented him from pursuing larger accounts and reduced his

opportunities for achievement.

Despite Plaintiff's claim lacking evidentiary support, Plaintiff's claim suffers from one fatal flaw- it is time-barred. Plaintiffs seeking relief pursuant to the ADA must exhaust administrative remedies by filing charges with the EEOC within 180 days after the alleged unlawful practice, or within 300 days if proceedings were initially instituted with a state or local agency. See 42 U.S.C. § 2000e-5(e)(1); 42 U.S.C. § 12117(a) (incorporating § 2000e-5 into the ADA's enforcement provisions). Similarly, the PHRA requires that plaintiffs file charges with the appropriate administrative agency within 180 days after the alleged discriminatory act. See 43 Pa. Cons. Stat. § 959(h).

Plaintiff filed a Complaint with the Pennsylvania Human Relations Commission ("PHRC"), which was dual filed with the EEOC, on November 22, 1999, and thereafter filed an Amended Complaint on June 1, 2000. (See Defs.' Attach. Exs. A and B.) However, the alleged discriminatory act complained of by Plaintiff occurred in February 1998, more than 300 days before Plaintiff filed his initial Complaint. Although Plaintiff's Complaint with the PHRC alleged that the "unlawful discriminatory practices: are of a continuing nature which have persisted up to and including the present time," the Supreme Court in National R.R. Passenger Corp. v. Morgan, 122 S.Ct. 2061 (2002) recently rejected the continuing violations doctrine, holding that a plaintiff raising claims of discrete discriminatory acts must file his charge within the appropriate time period- 180 or 300 days- set forth in 42 U.S.C. § 2000e-5(e)(1). Id. at 2071-73. The Court explained that ". . . discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. Each discriminatory act starts a new clock for filing charges alleging that act." Id. at 2072.

Based upon the Court's holding in Morgan, I can only conclude that Plaintiff's claim regarding his 1998 transfer is outside the statute of limitations. Plaintiff's transfer in 1998 must be considered a discrete act of alleged discrimination. Therefore, Plaintiff was required to file charges with the EEOC within 300 days of the February 1998, act. Accordingly, because Plaintiff did not file charges with the EEOC until November 22, 1999, summary judgment will be granted in favor of Defendants as to Plaintiff's claim of an adverse employment action under the ADA.

3. Reasonable accommodation

An employer commits unlawful discrimination under the ADA if the employer does "not make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an [] employee unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business of [the employer]." 42 U.S.C. § 12112(b)(5)(A). To prove a failure to accommodate, a plaintiff must show that: (1) the defendant is a covered employer; (2) he is disabled within the meaning of the statute; (3) he can perform the essential functions of the job with or without reasonable accommodation; and (4) the defendant knew of his disability and failed to provide him with reasonable accommodation. See Kralik v. Durbin, 130 F.3d 76, 78 (3d Cir. 1997) (citations omitted).

In the instant case, Plaintiff claims that he requested a reasonable accommodation for his asserted bipolar disorder in the form of FMLA leave. However, there is no evidence that any of the individual Defendants at Yellow Book knew that Plaintiff was disabled; Plaintiff never disclosed that information to them. As in the Court's reasoning for granting Defendants

summary judgment as to Plaintiff's FMLA claim, see *supra* Part III.B.1., a review of the undisputed facts leads to the determination that a reasonable jury could not conclude that Defendants were aware of Plaintiff's mental disability or that Plaintiff provided the minimal information necessary to grant and process his leave request. Therefore, because Plaintiff never advised Defendants of the real reason for wanting leave, Plaintiff never became entitled to leave and Defendants did not violate the ADA by not accommodating Plaintiff in the form of FMLA leave. Accordingly, Defendants' motion for summary judgment as to Plaintiff's claim for failure to accommodate will be granted.

4. Severe and Pervasive Harassment

Finally, in Counts II and V of the Complaint, Plaintiff asserts that Defendants unlawfully harassed him on the basis of his disabilities. Under the ADA, to establish a claim for hostile work environment, or harassment, a plaintiff must establish the following elements: (1) he is a qualified individual with a disability; (2) he was subjected to unwelcome harassment; (3) the harassment was based on his disability or a request for an accommodation; (4) the harassment was sufficiently severe or pervasive to alter the conditions of his employment and to create an abusive working environment; (5) the employer knew or should have known of the harassment and failed to take prompt remedial action. See Walton, 168 F.3d at 667.[8]

Essentially, a hostile work environment claim is comprised of a series of separate acts occurring over "a series of days or perhaps years." Morgan, 122 S.Ct. at 2073-74. In judging

[8]Although neither the United States Supreme Court nor the Third Circuit have conclusively determined whether the ADA creates a cause of action for harassment, the Third Circuit has proceeded on the assumption that a hostile work environment cause of action is created under the ADA without confirming that such a cause of action exists. See id. at 666-67.

whether such an environment is sufficiently hostile, a court must consider the totality of the circumstances, including "'the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" Walton, 168 F.3d at 667 (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993)). To be pervasive, the incidents "must be more than episodic, they must be sufficiently continuous and concerted." Faragher v. City of Boca Raton, 524 U.S. 775, 787 n.1 (1998).

Plaintiff alleges that several comments made by Yellow Book managers amounted to harassment.[9] Defendants argue that the individual incidents cited by Plaintiff did not rise to the level of unlawful disability harassment. While Defendants do not concede that the statements were made, even in accepting these statements as true, they do not constitute a claim for severe and pervasive harassment under the ADA. When viewed under the "totality of the circumstances," these statements are insufficient for a reasonable jury to find that the harassment was sufficiently continuous to be pervasive and rose to a level that unreasonably interfered with Plaintiff's work performance. Accordingly, Defendants' motion for summary judgment as to Plaintiff's allegation of severe and pervasive harassment under the ADA will be granted.

D. Pennsylvania Human Relations Act- Bipolar Disorder

Defendants also seek to dismiss Plaintiff's claims of discrimination under the PHRA as being time-barred because Plaintiff failed to file the Complaint alleging disability discrimination

[9]Plaintiff cites the following incidents as evidence of harassment: (1) Defendant Rubel made several comments about Plaintiff's weight, including that he had a "fat face," and that he should "lose twenty pounds," (Pl.'s Ex. B at 202, 204); (2) Defendant McCusker referred to Plaintiff as the "Nutty Professor" (Pl.'s Ex. B at 197); and (3) Daniel Staub stated in a room full of co-workers that Plaintiff had overcome a "sickness." (Pl.'s Ex. B at 217.)

for his asserted bipolar disorder within the applicable statute of limitations. However, Plaintiff's claims under the PHRA must fail because his claims for discrimination under the ADA have previously been denied and summary judgment granted in favor of Defendants.[10] See *supra,* Part III.C.1-4. Accordingly, I will grant summary judgment to Defendants as to Plaintiff's claims of discrimination under the PHRA.

E. Individual Defendants Walsh, Scharrarr, McCusker, Rubel, Flynn, and Snyder-Rebstock

In Counts III, IV and V of the Complaint, Plaintiff asserts claims for discrimination and unlawful termination/failure to reinstate under the PHRA and FMLA against the individual Defendants. However, because Plaintiff has failed to demonstrate that there was an adverse employment action or that he was subjected to severe and pervasive harassment, Plaintiff's claims against the individual Defendants must fail. Accordingly, as to said claims, Defendants' motion for summary judgment will be granted.

An appropriate order follows.

[10]Generally, Pennsylvania courts interpret the PHRA in accord with its federal counterparts and treat a plaintiff's PHRA claims as coextensive with his ADA claims. See Kelly, 94 F.3d at 105.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH P. MCCARRON,	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	
	:	NO. 00-CV-6123
BRITISH TELECOM d/b/a/	:	
YELLOWBOOK USA,	:	
YELLOWBOOK USA a/k/a	:	
BRITISH TELECOM,	:	
SCOTT RUBEL,	:	
JIM MCCUSKER,	:	
VICTORIA SCHARRARR,	:	
JOSEPH A. WALSH,	:	
ANN SNYDER-REBSTOCK, and	:	
LINDA FLYNN,	:	
Defendants.	:	

ORDER

AND NOW, this _____ day of August, 2002, upon consideration of Defendants' Motion for Summary Judgment, Plaintiff's Response, Defendants' Reply, Plaintiff's Supplemental Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment and Defendants' Reply thereto; and (2) Plaintiff's Motion for Partial Summary Judgment and Defendants' Response, **IT IS HEREBY ORDERED** that:

1. Defendants' Motion for Summary Judgment is **GRANTED**;

2. Plaintiff's Motion for Partial Summary Judgment is **DENIED**.

BY THE COURT:

_____

CLIFFORD SCOTT GREEN, S.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH P. MCCARRON,	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	
	:	NO. 00-CV-6123
BRITISH TELECOM d/b/a/	:	
YELLOWBOOK USA,	:	
YELLOWBOOK USA a/k/a	:	
BRITISH TELECOM,	:	
SCOTT RUBEL,	:	
JIM MCCUSKER,	:	
VICTORIA SCHARRARR,	:	
JOSEPH A. WALSH,	:	
ANN SNYDER-REBSTOCK, and	:	
LINDA FLYNN,	:	
Defendants.	:	

JUDGMENT

AND NOW, this _____ day of August, 2002, **IT IS HEREBY ORDERED** that judgment is entered in favor of Defendants and against Plaintiff.

BY THE COURT:

_____

CLIFFORD SCOTT GREEN, S.J.